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Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Exceptions to the Preliminary and Second Reports of the Special Master

EXCEPTIONS BY PLAINTIFFS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS BY PLAINTIFFS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

Plaintiffs except to the following conclusions of the Special Master:

1. Article 7(F) of the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"), which states that the Commission may "sanction[ ]" "[a]ny party state which fails to comply with the provisions . . . or . . . fulfill the obligations" of "this compact," does not give the Commission the authority to level monetary sanctions against a party State when it fails to comply with the Compact. Preliminary Report 15-25.

2. Even if North Carolina violated the Compact, it was not subject to the sanctions authority of the Commission because it withdrew from the Compact

before sanctions were imposed. Preliminary Report 25-29.

3. North Carolina did not waive its right to contest the legality of the sanctions proceedings even though it attended and refused to participate in the hearing. Preliminary Report 29-30.

4. Even though the Compact expressly provides that the Commission is "the judge of the [party States'] compliance with the conditions and requirements of this compact," Art. 7(C), the Commission's determination that North Carolina breached the Compact is neither conclusive nor entitled to any deference from the Court. Second Report 19-20.

5. While it is undisputed that North Carolina ceased taking any steps to license a facility in December 1997, more than 18 months before it withdrew from the Compact, North Carolina, as a matter of law, did not breach its duty under the Compact to "take appropriate steps to ensure that an application for a license to construct and operate a facility . . . is filed." Art. 5(C). Second Report 10-24.

6. The implied duty of good faith and fair dealing does not apply to interstate compacts and North Carolina did not withdraw from the Compact in bad faith. Second Report 29-35.

7. North Carolina did not repudiate the Compact when it informed the Commission that it would take no further steps to license a facility. Second Report 24-28.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION AND SUMMARY OF THE CASE	1
JURISDICTION	4
STATEMENT OF THE CASE	4
A. The Southeast Interstate Low-Level Radioactive Waste Management Compact	4
B. The Present Controversy	7
C. Judicial Proceedings	14
ARGUMENT	17
I. THE COMMISSION'S SANCTIONS ORDER SHOULD BE ENFORCED	17
A. The Compact Authorizes The Commission To Impose The Sanction Of Restitution	17
B. North Carolina Cannot Escape Sanctions For Its Conduct As A Compact Member By Withdrawing From The Compact	23
II. NORTH CAROLINA BREACHED THE COMPACT	25
A. The Commission's Determination That North Carolina Breached The Compact Is Conclusive Or, In The Alternative, Entitled To Deference	25
B. North Carolina Breached The Compact By Failing To Take "Appropriate Steps" To Fulfill Its Obligations As Host State	30

TABLE OF CONTENTS – continued

Page

C. North Carolina Breached Its Implied Covenant Of Good Faith And Fair Dealing 41

D. North Carolina Repudiated The Contract 48

III. THE PLAINTIFFS ARE ENTITLED TO RESTITUTION 51

CONCLUSION 53

APPENDIX

APPENDIX A: Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, tit. II, 99 Stat. 1859 (1986)..... 1a

APPENDIX B: Southeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 223, 99 Stat. 1871 (1986) 3a

TABLE OF AUTHORITIES

CASES Page

Beebe v. *Wash. Metro. Area Transit Auth.*, 129 F.3d 1283 (D.C. Cir. 1997) 32, 44
Bohne v. *Computer Assocs. Int'l, Inc.*, 445 F. Supp. 2d 177 (D. Mass. 2006), *rev'd on other grounds*, 541 F.3d 141 (1st Cir. 2008) 45
Commercial Ins. Co. of Newark, N.J. v. *Gonzalez*, 512 F.2d 1307 (1st Cir. 1975).... 33
Cooper Distrib. Co. v. *Amana Refrigeration, Inc.*, 63 F.3d 262 (3rd Cir. 1995)..... 36
Dolan v. *United States Postal Ser.*, 546 U.S. 481 (2006)..... 37
Entergy Ark., Inc. v. *Nebraska*, 358 F.3d 528 (8th Cir. 2004) 45
Fid. Fed. Bank, FSB v. *Durga MA Corp.*, 386 F.3d 1306 (9th Cir. 2004)..... 30
Franconia Assocs. v. *United States*, 536 U.S. 129 (2002)..... 31, 37
Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006).. 27
Herb's Welding, Inc. v. *Gray*, 470 U.S. 414 (1985)..... 19
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988)..... 20
Kansas v. *Colorado*, 533 U.S. 1 (2001) 32
Mkt. Street Assocs. Ltd. P'ship v. *Frey*, 941 F.2d 588 (7th Cir. 1991)..... 43
Mobil Oil Exploration & Producing Se., Inc. v. *United States*, 530 U.S. 604 (2000)..... 48, 52
NLRB v. *Granite State Joint Bd., Textile Workers Union of Am., Local 1029*, 409 U.S. 213 (1972)..... 24
New Jersey v. *New York*, 523 U.S. 767 (1998)..... 26

TABLE OF AUTHORITIES – continued

Page

Oklahoma v. *New Mexico*, 501 U.S. 221 (1991) 44
Old Town Trolley Tours of Wash., Inc. v. *Wash. Metro. Area Transit Comm'n*, 129 F.3d 201 (D.C. Cir. 1997) 28
Organic Cow, LLC v. *Ne. Dairy Compact Comm'n*, 164 F. Supp. 2d 412 (D. Vt. 2001), *vacated on other grounds sub nom.* 335 F.3d 66 (2d Cir. 2003) 28
Randolph v. *New England Mut. Life Ins. Co.*, 526 F.2d 1383 (6th Cir. 1975) 45, 46
Russello v. *United States*, 464 U.S. 16 (1983) 21
Superior Bus. Assistance Corp. v. *United States*, 461 F.2d 1036 (10th Cir. 1972) 33
Texas v. *New Mexico*, 462 U.S. 554 (1983) 21, 22, 26, 29
Texas v. *New Mexico*, 482 U.S. 124 (1987) ... 45
Tymshare, Inc. v. *Covell*, 727 F.2d 1145 (D.C. Cir. 1984) 44, 46
United Roasters, Inc. v. *Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981) 45
U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 27
U.S. Dep't of Energy v. *Ohio*, 503 U.S. 607 (1992) 18, 19
United States v. *Winstar Corp.*, 518 U.S. 839 (1996) 25
United Steelworkers of Am. v. *Am. Mfg. Co.*, 363 U.S. 564 (1960) 30

STATUTES AND REGULATIONS

Low-Level Radioactive Waste Policy Act. Pub. L. No. 96-573, 94 Stat. 3347 (1980) .. 4

TABLE OF AUTHORITIES – continued

Page

Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, tit. II, 99 Stat. 1859 (1986)..... 4

Southeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 223, 99 Stat. 1871 (1986) ..... *passim*

Rocky Mountain Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 226, 99 Stat. 1902 (1986) 22

Northeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 227, 99 Stat. 1909 (1986) 22, 23

42 U.S.C. § 1983 23
§ 2000e-5(g)(1)..... 23
§ 2021(d)(2) 32
§ 2021d(b)(3)..... 32

1987 N.C. Sess. Laws ch. 1086 38
ch. 850 7

1999 N.C. Sess. Laws ch. 357 12

N.C. Gen. Stat. § 104G..... 7
§ 104G-4 (repealed 2000) *passim*
§ 104G-15..... 7

10 C.F.R. pt. 61..... 32
§ 61.10..... 33
§§ 61.11-.16..... 33

SCHOLARLY AUTHORITIES

1 E. Allan Farnsworth, *Farnsworth on Contracts* (3d. ed. 2004) 47

2 E. Allan Farnsworth, *Farnsworth on Contracts* (3d. ed. 2004) 42, 50

TABLE OF AUTHORITIES – continued

Page

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OTHER AUTHORITIES

Black's Law Dictionary (7th ed. 1999) 19

Restatement (Second) of Contracts (1981) *passim*

Restatement (Third) of Restitution & Unjust Enrichment (T.D. No. 1, 2001) 47

Restatement (Third) of Restitution & Unjust Enrichment (T.D. No. 3, 2004) 47

Katherine Ling, *Low-Level Waste Emerges as Hurdle for New Nuclear Reactors*, N.Y. Times, March 16, 2009, *available at* http://www.nytimes.com/allbusiness/16greenwire-lowlevel-waste-emerges-as-hurdle-for-new-react-10146.html?pagewanted=1 5

PLAINTIFFS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

INTRODUCTION AND SUMMARY OF THE CASE

This case involves a lawsuit brought by several States and the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission") against the State of North Carolina for its failure to fulfill its obligations under the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") to license a waste disposal facility.

Plaintiffs take exceptions to a number of the recommendations made in the Special Master's Preliminary and Second Reports.

In Part I, Plaintiffs show that the Special Master wrongly recommended that this Court find that the Commission lacked authority to impose monetary sanctions on North Carolina. The Compact provides that "[a]ny party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state . . . may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state." Art. 7(F). By its plain terms, this provision includes monetary sanctions. Indeed, this Court has held that the term "sanctions" is broad enough to embrace monetary penalties. The Special Master's conclusion that the phrase "including suspension . . . and revocation" in Article 7(F) limits the Commission's sanctioning authority to only those two remedies is incorrect. "Including" is a term of expan-

sion, not limitation. That is how the Commission read the Compact, and that reading is correct.

The Special Master's conclusion that the Commission lost authority to sanction North Carolina for misconduct committed while a Compact member once North Carolina withdrew from the Compact is equally wrong. The Compact's sanctions provision expressly provides: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Art. 7(F). Thus, by its terms, the Compact provides that the Commission may enforce sanctions against a former party State for the State's acts while a member of the Compact.

In Part II, Plaintiffs show that the Special Master's conclusion that North Carolina did not breach the Compact is wrong as a matter of law. Significantly, the Compact expressly states that the Commission "is the judge" of the party States' compliance with its conditions and requirements. In 1998, the Commission made an authoritative determination that North Carolina breached the Compact when it ceased licensing activities and refused to develop and operate a waste disposal facility for the region. That determination, made pursuant to an express and unambiguous delegation of authority, is conclusive. In reaching his contrary conclusion, the Special Master failed even to address the plain language of the Compact.

At the very least, the Court should defer to the Commission's fully-supported determination that North Carolina breached the Compact. It is undisputed that for approximately a year and a half between the time that North Carolina ceased licensing activities in December 1997 and the time that it withdrew from the Compact in July 1999, North

Carolina failed to take any further steps to license a facility. That refusal constituted nonperformance of North Carolina's most fundamental obligation as a host State and was a total breach of the Compact.

North Carolina also breached the implied covenant of good faith and fair dealing when it withdrew from the Compact. North Carolina induced the other party States to invest eleven years and $80 million[1] in its licensing effort, and then walked away. It cited the Plaintiffs' failure to provide it with further funds as the sole reason, despite the Compact's clear statement that the host State is responsible for the cost of licensing and building the facility. Withdrawal in these circumstances left the States with nothing to show for the enormous investment of time and money they had made in reliance on North Carolina's good faith performance.

In addition, North Carolina repudiated the Compact when it informed the Commission that it would no longer take any steps to license a facility and then instructed the North Carolina Authority to initiate a shutdown of the project. The Special Master did not even address North Carolina's clear statements of repudiation.

North Carolina committed a total breach and repudiation of the Compact by refusing to render the very performance that it agreed to exchange for the other States' performance, defeating the essential purpose of the Compact and depriving the other States of the benefit of their bargain. For these reasons, Plaintiffs are entitled to the enforcement of the sanctions order, or, in the alternative, restitution of the $80 million

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[1] Acting on behalf of the party States, the Commission provided North Carolina with $ 79,917,546.89. For ease of reference, Plaintiffs refer to this amount as $80 million throughout.

benefit they conferred on North Carolina in reliance on the Compact, plus interest.

JURISDICTION

In June 2002, four of the member States of the Compact and the Commission filed a motion for leave to file a Bill of Complaint, which the Court granted. This Court's jurisdiction over this controversy between various States is both original and exclusive. See U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

The Special Master filed his Preliminary and Second Reports with this Court on April 2, 2009. On April 27, 2009, the Court received these Reports and ordered them filed.

STATEMENT OF THE CASE

A. The Southeast Interstate Low-Level Radioactive Waste Management Compact

In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act, which was subsequently amended by the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, which ratified the Southeast Interstate Low Level Radioactive Waste Management Compact ("Compact"). See Pub. L. No. 96-573, 94 Stat. 3347 (1980); Pub. L. No. 99-240, tit. II, 99 Stat. 1859 (1986). In these Acts, Congress declared that it is primarily the responsibility of the States to dispose of low-level radioactive waste and encouraged the States to form regional interstate compacts to develop disposal facilities in an efficient and effective manner.

The States formed the Compact "for the purpose of providing the instrument and framework for a cooperative effort [and for] provid[ing] sufficient facilities for the proper management of low-level radioactive

waste generated in the region." Art 1.[2] The Compact, which is both a contract among the member States and a federal law, was formally adopted by Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia, and consented to by Congress on January 15, 1986. Plaintiffs' Statement of Undisputed Material Facts ("Undisputed Facts") ¶¶ 7, 8. The Compact created the Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission") consisting of two voting members from each party State. Art. 4(A).

The Compact requires that each party State take a turn at siting and operating a regional facility within its borders. Art. 5(A). Specifically, the Compact requires each State to serve as a "host State" for up to 20 years, or until it has disposed of 32,000,000 cubic feet of low-level radioactive waste. Art. 5(E). By rotating the obligation to provide a regional waste disposal facility among the States, the Compact "limit[s] the number of facilities required to effectively and efficiently manage low-level waste generated in the region," while "distribut[ing] the costs, benefits and obligations of successful low-level radio-

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[2] As discussed *infra*, that purpose has not been met and the management of low-level radioactive waste continues to be a growing public health problem across the country. Few facilities exist to store the material and on-site storage is becoming overrun and increasingly dangerous. *See* Katherine Ling, *Low-Level Waste Emerges as Hurdle for New Nuclear Reactors*, N.Y. Times, Mar. 16, 2009, *available at* http://www.nytimes.com/allbusiness/16greenwire-lowlevel-waste-emerges-as-hurdle-for-new-react-10146.html?pagewanted=1. North Carolina's refusal to fulfill its obligations under the Compact thus, not only breached the contract with the other Compact States but exposed all of the states to serious health hazards by delaying the creation of a disposal facility for more than two decades.

active waste management equitably among the party states." Art. 1.

The Compact imposes specific duties on the host State. It mandates that "[e]ach party state designated as a host State for a regional facility shall take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Art. 5(C). The Compact also declares that "[h]ost states are responsible for the availability, the subsequent post closure observation and maintenance, and the extended institutional control of their regional facilities." Art. 3(C); cf. Art. 4(K).

Under the Compact, the first regional disposal facility was the facility previously built and licensed in Barnwell County, South Carolina, which was to serve as the regional facility until December 31, 1992. Art. 7(H). The Compact authorized the Commission to develop and implement procedures and criteria to identify a host State for the development of a second regional disposal facility. Art. 4(E)(6). The Compact expressly states, however, that "[t]he Commission is not responsible for any costs associated with," *inter alia*, "the creation of any facility." Art. 4(K).

The Commission also has certain powers related to the enforcement of the Compact. For example, the Compact expressly provides that "the Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of th[e] compact." Art. 7(C). The Commission may also "sanction[ ]" a noncompliant state, "including suspension of its rights under this compact and revocation of its status as a party state." Art. 7(F).

B. The Present Controversy

In September 1986, by a two-thirds majority vote, the Commission selected North Carolina as the second host State. Undisputed Facts ¶ 17. Thereafter, the North Carolina General Assembly enacted a law establishing a siting authority, the North Carolina Low-Level Waste Management Authority (the "Authority"). N.C. Gen. Stat. § 104G, 1987 N.C. Sess. Laws ch. 850 (App. 29-58).[3]

In its enabling statute, North Carolina recognized and accepted its obligation under the Compact to "site, finance, [and] build" a facility to receive the region's low-level radioactive waste for disposal. N.C. Gen. Stat. § 104G-4 (repealed 2000) (App. 34). The North Carolina statute further provided that the State would be repaid for its expenses from revenues generated by the facility, once operational. See *id.* § 104G-15(a) (App. 45) (expressing intent that costs will ultimately be borne by generators served by the facility "established under this Chapter"); *id.* § 104G-15(b)(2), (5), & (8) (App. 45). Pursuant to its obligation, North Carolina appropriated funds from the General Assembly and began the site-selection process. Undisputed Facts ¶ 18.

Thereafter, North Carolina requested that the Commission provide financial assistance. Although

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[3] Unless otherwise indicated, Appendix pages 1-470 are attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment; Appendix pages 471-514 are attached to Plaintiffs' Opposition to Defendant North Carolina's Motion for Summary Judgment; Appendix pages 515-57 are attached to Plaintiffs' Brief in Opposition to Defendant North Carolina's Motion and Supplemental Brief for Summary Judgment; and Appendix pages 559-69 are attached to Plaintiffs' Reply to Defendant North Carolina's Opposition to Plaintiffs' Supplemental Brief for Summary Judgment.

not obligated to do so, the Commission, on behalf of the party States, began providing funds to North Carolina in 1988 to assist with the development of a facility. Undisputed Facts ¶¶ 20-21; Feb. 9, 1988, Resolution (App. 63-65). All parties were fully aware at this time that the Commission had no obligation to provide funds. Undisputed Facts ¶ 21; see also Mar. 28, 1988, Gov. Martin letter to Hodes (App. 69) ("I have been informed that the Southeast Compact has established a Host State Assistance Fund to assist . . . with financial costs . . . ." However, "the [North Carolina] Authority is responsible for siting, financing, building, . . . operating, . . . and closing this regional facility.").

Indeed, the Authority made a series of requests for funding in specific amounts, each time with the understanding that the Commission was not obligated to provide it, and that the Commission could refuse to grant the Authority's funding requests. See McMillan Dep. at 40:13-:17 (App. 470). Over the next eleven years, the Commission provided approximately $80 million to North Carolina to assist it in fulfilling its responsibility to site and license the project. The funds were generated through "surcharges on all users of [the Barnwell regional disposal] facility" and "represent[ed] the financial commitments of all party states," as defined by the Compact. Art. 4(H)(2) & (2)(b).

During this same period, North Carolina experienced a series of project delays and cost increases. Undisputed Facts ¶¶ 25, 29, 35. Consequently, in June 1992, the South Carolina Legislature voted to allow the Barnwell facility to remain open until January 1, 1996. *Id.* ¶ 30. By December 1994, due to additional delays, the North Carolina facility was not projected to open until 1998. *Id.* ¶ 36. Throughout

this period, North Carolina received the benefits of Compact membership, such as the ability to dispose of its waste at the facility in South Carolina.

As time passed South Carolina seriously doubted that North Carolina would ever open the second regional facility, and in July 1995, lawfully withdrew from the Compact. *Id.* ¶ 40. On January 5, 1996, Commission Chairman Hodes wrote to North Carolina Governor Hunt to explain that the Commission had contributed $55 million to North Carolina in furtherance of the waste facility project, but that additional Commission funds would eventually be unavailable because South Carolina's withdrawal meant that the Commission would no longer be able to collect the surcharges imposed at Barnwell. Chairman Hodes encouraged Governor Hunt to begin considering alternative funding sources, consistent with North Carolina's obligations under the Compact. *Id.* ¶ 42; see Jan. 5, 1996, Hodes letter to Hunt (App. 215).

Governor Hunt responded that he "would not recommend" that North Carolina appropriate the funds necessary to continue the project. Apr. 8, 1996, Hunt letter to Hodes (App. 224). Chairman Hodes sent several subsequent letters to Governor Hunt reminding him that, by law, the designated host State is responsible for siting, licensing, building and operating the facility, and that this responsibility includes providing the necessary funding. See, *e.g.*, Apr. 25, 1996, Hodes letter to Hunt (App. 225-26); May 10, 1996, Hodes letter to Hunt (App. 227).

On June 14, 1996, Governor Hunt informed the Commission that "North Carolina is not prepared to assume a greater portion of the project costs. If the Commission is not willing or able to continue funding the North Carolina licensing effort, it simply will not

be able to proceed." June 14, 1996, Hunt letter to Hodes (App. 236); Undisputed Facts ¶ 44. Governor Hunt did not address the Commission's position or the Compact language stating that the Commission is "not responsible for any costs associated with . . . the creation of any facility." Art. 4(K).

The Commission then organized a Task Force for Facility Funding (the "Task Force"), which included representatives from North Carolina, to study the issue and make recommendations for funding alternatives. Undisputed Facts ¶ 48. A group of regional waste generators developed a draft Memorandum of Understanding ("MOU"), which incorporated the Task Force's funding recommendations. *Id.* ¶ 52.

The Commission transmitted the draft MOU to Governor Hunt in August 1997. Undisputed Facts ¶ 52; Sturgeon Mem. & Draft MOU (App. 289-304). Under the proposed MOU, the Commission would have expended the remainder of its funds, up to $22.5 million, and generators would have provided loans for the $7-9 Million projected shortfall in funds required to complete the licensing phase of the project. Draft MOU 3 (App. 294). Upon transmission of the proposed MOU, the Commission asked the North Carolina Authority either to endorse the proposal or to propose an alternative method of funding. Undisputed Facts ¶ 53; Aug. 29, 1997, Hodes letter to Corgan (App. 308).

By December 1, 1997, North Carolina had neither endorsed the MOU nor proposed any other funding plan. Undisputed Facts ¶ 54. Instead, the North Carolina Authority notified the Commission of the Authority's decision to "commence the orderly shutdown of the project," pending the Commission's reversal of its position regarding funding or different instructions from the North Carolina Legislature.

See Dec. 19, 1997, Corgan letter to Hodes (App. 319); Undisputed Facts ¶ 55. Thus, North Carolina conditioned its continued performance on more funding from the Commission, a demand that contradicted the express terms of the Compact. See Art. 4(K).

The Commission notified the North Carolina Authority in January 1998, and again in April 1999, that it had determined the shutdown constituted a breach of the Compact by North Carolina. Undisputed Facts ¶¶ 56-57. North Carolina took no action in response and, by its own admission, "did not [after December 1997] take additional steps to site, characterize, and, ultimately, license a waste disposal facility."[4] North Carolina's Admissions ¶ 11; Undisputed Facts ¶¶ 57-58.

On June 21, 1999, the Commissioners of the States of Florida and Tennessee filed with the Commission a Sanctions Complaint against North Carolina. Undisputed Facts ¶ 58. The Sanctions Complaint alleged that

> [b]y its actions to cease all activities in pursuit of a license to build the second regional low-level radioactive waste (LLRW) disposal facility for the Southeast Interstate Low-Level Radioactive Waste Compact (Compact), the State of North Carolina has failed to fulfill its obligations . . . to provide a disposal facility for the Southeast region.

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[4] Indeed, the Authority ceased operation prior to any licensing determination. See Def. Mot. Summ. J. at 7 ("Ultimately, no license was issued because, at the time the Commission stopped providing funding support for the Authority's efforts in 1997, the DRP had not yet determined that the site could be safely licensed.").

Sanctions Compl. (App. 325). The Sanctions Complaint requested, *inter alia*, return of the $80 million in funds the Commission, on behalf of the party States, had provided to North Carolina to assist in the licensing and development of the disposal facility, plus interest from the date North Carolina ceased activities to develop the facility. Undisputed Facts ¶ 58; Sanctions Compl. (App. 327).

On July 26, 1999, North Carolina purported to exercise its rights under Article 7(G) of the Compact to withdraw from the Compact. Undisputed Facts ¶ 59; 1999 N.C. Sess. Laws ch. 357. North Carolina claimed that it "had no option but to" withdraw as a result of the Commission's breach of the Compact (by terminating supplemental funding as of December 1, 1997). Dec. 1, 1999, Easley letter to Hodes (App. 339).

In August 1999, the Commission initiated a formal inquiry into the Sanctions Complaint filed against North Carolina. Undisputed Facts ¶ 60. The North Carolina Attorney General asserted that, having withdrawn from the Compact, North Carolina was no longer subject to the Commission's jurisdiction. *Id.* ¶ 62; see Dec. 1, 1999, Easley letter to Hodes (App. 340). The Attorney General also informed Chairman Hodes that North Carolina would not participate in the sanctions proceeding. Dec. 1, 1999, Easley letter to Hodes (App. 340).

The Commission held a Sanctions Hearing on December 8, 1999 presided over by retired D.C. Superior Court Judge Curtis VanKann. Undisputed Facts ¶ 63; Sanctions Hr'g Tr. (App. 341-98). The Commission heard testimony and received documentary evidence from the States of Florida and Tennessee. Sanctions Hr'g Tr. 16-72 (App. 347-61). All Commissioners were permitted to ask questions and make

comments. *Id.* at 1-144 (App. 344-79). Comments also were received from members of the public. *Id.* at 7-8, 97-98 (App. 345, 368). In addition, North Carolina had a representative from its Office of the Attorney General present at the hearing and was provided the opportunity to offer testimony or other evidence on its behalf. North Carolina declined to exercise its right to participate in the hearing.

By a unanimous vote of those participating, the Commission determined, pursuant to Article 7(C) of the Compact, that North Carolina had "failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party state to th[e] Compact." Undisputed Facts ¶ 64; Dec. 9, 1999, Sanctions Res. (App. 412). Consequently, the Commission voted to require North Carolina to repay the approximately $80 million in funds it had received from the party States via the Commission, plus interest. Sanctions Res. (App. 412). The Commission also determined that according to its authority under Article 7(F), it had the authority to level sanctions against North Carolina even after it had withdrawn from the Compact. *Id.*; see also Art. 7(F) ("Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction."). The Commissioners unanimously adopted a resolution directing the Commission to work with outside counsel to represent the party States in court against North Carolina, in the event that North Carolina failed to comply with sanctions. Undisputed Facts ¶ 64; Dec. 9, 1999, Sanctions Res. (App. 412). North Carolina did not comply.

C. Judicial Proceedings

After this Court denied an initial motion for leave to file a bill of complaint naming only the Commission as plaintiff, four member States of the Compact and the Commission filed a motion for leave to file a Bill of Complaint in June 2002. This Court granted that motion; the Bill of Complaint was deemed filed; and North Carolina was ordered to respond to the Complaint.

North Carolina filed a motion to dismiss the Commission as a party, arguing that North Carolina's sovereign immunity barred the Commission's claims. The Supreme Court referred this matter to the Special Master.

Before the Special Master, Plaintiffs filed a motion for summary judgment, seeking enforcement of the Commission's sanctions order. North Carolina filed a motion to dismiss the Bill of Complaint, arguing that the Compact did not authorize the Commission to impose monetary sanctions; that North Carolina was no longer subject to the Commission's jurisdiction; and that the only remedies available to Plaintiffs were those provided in the Compact.

In June 2006, the Special Master issued a Preliminary Report, recommending that North Carolina's motion to dismiss the Commission be denied, that Plaintiffs' motion for summary judgment be denied, and that North Carolina's motion to dismiss the Bill of Complaint be granted in part and denied in part.

With respect to North Carolina's motion to dismiss the Commission, the Special Master recommended that the Commission be allowed to participate in the action because it asserts the same claims and seeks the same relief as the Plaintiff States. Preliminary

Report 13 (citing *Arizona* v. *California*, 460 U.S. 605 (1983)).

As to Plaintiffs' motion for summary judgment, the Special Master recommended that the motion "be denied because the Compact does not authorize the Commission to impose monetary sanctions against member States, and because North Carolina withdrew from the Compact prior to the imposition of sanctions." *Id.* at 14. The Special Master noted, however, that "[d]enial of Plaintiffs' motion . . . merely means that the Commission's sanctions order should not be summarily enforced. It does not mean that North Carolina faces no potential liability as a matter of law with respect to the Plaintiffs' other claims" for breach of contract and the common law. *Id.* at 14-15.

As to North Carolina's motion to dismiss the Bill of Complaint, the Special Master recommended that the motion be granted with respect to the Plaintiffs' request that the sanctions order be enforced. *Id.* at 38. With respect to the remainder of the Bill of Complaint, the Special Master recommended that North Carolina's motion be denied. *Id.* The Special Master rejected North Carolina's argument that the remedies provided in the Compact are the exclusive remedies available for breach of the Compact. *Id.* at 33-36. Accordingly, he found that "further proceedings [were] necessary to determine whether North Carolina in fact breached its obligations under the Compact." *Id.* at 36.

The parties did not seek this Court's immediate review of the Preliminary Report. Instead, they engaged in discovery, which eventually was suspended in order to file cross-motions for summary judgment. Plaintiffs moved for summary judgment with respect to the Breach of Compact count on the grounds that

North Carolina breached the Compact and that Plaintiffs are entitled to restitution of the $80 million the States provided North Carolina in reliance on the Compact, plus interest. North Carolina moved for summary judgment on all of Plaintiffs' claims.

In his Second Report, the Special Master recommended that this Court find that North Carolina did not breach the Compact. According to the Special Master, the Compact's requirement that a host State take "appropriate steps" to license a facility is ambiguous; and, under the Compact as modified by the parties' course of performance, North Carolina took the appropriate steps required by the Compact. Second Report 10-28. The Special Master also decided that North Carolina's withdrawal did not violate its implied covenant of good faith and fair dealing. He concluded that (i) the covenant of good faith, read into all contracts, probably should not be read into interstate compacts, and (ii) if it were, North Carolina's decision to cease performance when the Commission ceased paying did not breach that duty. *Id.* at 29-35. Thus, the Special Master recommended that this Court deny Plaintiffs' Motion for Summary Judgment on Breach of Contract and grant North Carolina's Motion for Summary Judgment on that count.[5]

The Special Master filed both his Preliminary and Second Reports with this Court. He noted that the remaining claims were alternatives to Plaintiffs' breach of contract claims, which would not be liti-

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[5] In addition, the Special Master recommended that North Carolina's Motion for Summary Judgment on Unjust Enrichment, Promissory Estoppel, and Money Had and Received be denied as requiring further briefing and argument and, potentially, further discovery. *See* Second Report 41.

gated if this Court rejected his recommendations on the claims for sanctions and breach of contract. *Id.* at 48-49.

On April 27, 2009, the Court received and ordered filed the Reports of the Special Master, and ordered the Parties to file Exceptions.

ARGUMENT

I. THE COMMISSION'S SANCTIONS ORDER SHOULD BE ENFORCED.

A. The Compact Authorizes The Commission To Impose The Sanction Of Restitution.

The Compact provides:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be *subject to sanctions by the Commission*, including suspension of its rights under this compact and revocation of its status as a party state.

Art. 7(F) (emphasis added).

After a formal evidentiary hearing – at which North Carolina was in attendance but refused to participate – the Commission determined that North Carolina had "failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party to th[e] Compact." Dec. 9, 1999 Sanctions Res. (App. 412); Undisputed Facts ¶ 64. The Commission made this determination pursuant to its authority as "the judge of [the party States'] compliance with the conditions and requirements of this compact." Art. 7(C). As set forth in

detail *infra* at II.A, this determination of breach is conclusive or, at the very least, entitled to deference. [6]

Following the Commission's determination of breach, it imposed a monetary sanction. In doing so, it necessarily interpreted the Compact to give it this authority. This interpretation is reasonable and is, indeed, the best reading of the Compact language. Pursuant to this Court's precedent, ordinary usage, and the specific context, the term "sanctions" includes monetary sanctions; and thus, the Commission's sanction's order should be given effect by this Court. See *U.S. Dep't of Energy* v. *Ohio*, 503 U.S. 607, 621 (1992).

Instead, the Special Master decided that the Compact clause providing that sanctions "includ[e] suspension of [a State's] rights under this compact and revocation of its status as a party state" was intended to dramatically narrow the Commission's authority to impose sanctions. He disregarded the Commission's reading of this Compact provision and read the clause *de novo* to indicate that the Commission could suspend or expel members, but could not fine a member or impose other monetary sanctions. Thus, the Special Master concluded that the sole sanction that the Commission could impose on a host State that breaches its obligations and then withdraws is expulsion. But this "sanction" gives that State precisely what it wants – to avoid its obligation to host a waste disposal facility. Preliminary Report 28.

The Special Master gave four reasons for his conclusion. Each lacks merit.

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[6] The Commission "is the judge" of the party States' compliance with the Compact, Art. 7(C), and thus is entitled to determine whether a party state has breached the Compact. *See infra* at II.A.

First, the Special Master asserted that "including," in the Compact, actually means "limited to" and, therefore, the "sanctions" available do not include monetary awards. But, application of this Court's precedent, scholarly consensus, and common sense lead to the conclusion that the term "including" here does not limit the sanctions to those listed or preclude monetary sanctions. A sanction is "[a] penalty or coercive measure that results from failure to comply with a law, rule, or order." *Black's Law Dictionary* 1341 (7th ed. 1999). This Court has stated that when a sovereign submits itself to "sanctions," it is thereby subject to monetary sanctions of one variety or another: "As a general matter, the meaning of 'sanction' is spacious enough to cover . . . punitive fines . . . ." *U.S. Dep't of Energy*, 503 U.S. at 621. Moreover, "[w]hen 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded." 2A Norman J. Singer & J.D. Singer, *Sutherland Statutes and Statutory Construction* § 47.23 (7th ed. 2004). This is because "'the word "includes" is usually a term of enlargement, and not of limitation.'" *Id.* at § 47.7. As this Court recognized in *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985), "[b]y use of the term 'including' Congress indicated that the specifically mentioned [items] are not exclusive." Therefore, the "including" clause should not be construed to limit the imposition of other appropriate sanctions.

The Special Master also failed to give weight to the entirety of the sanctions provision. The Compact's sanctions provision concludes: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Art. 7(F).

The Compact thus necessarily authorizes some sanction that can be applied to a party state that ceases to be a party after the sanction is imposed. This provision is meaningless if one accepts the Special Master's reading that sanctions are limited to suspension or revocation of a party State's membership status; neither of these sanctions would be relevant to a State that has already withdrawn.

As a whole, Article 7(F) is best read to authorize the Commission to assess monetary sanctions against the Defendant. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.")

Second, the Special Master concluded that the Compact must contain a "clear statement" that authorizes monetary sanctions against a State. Initially, as explained above, the Compact *does* clearly provide for monetary sanctions. But even if it did not, it is inappropriate to impose a clear-statement rule on the interpretation of a contract among coequal sovereign states.

The Special Master pointed to Article 3, which reads, in part: "The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit, or abridge those rights." The Special Master then contended that in light of this provision, the Court should read an implied clear-statement rule into the Compact – *i.e.*, a rule that without a "clear statement," monetary sanctions are not allowed. Preliminary Report 18. For several reasons, this reading is incorrect.

Article 3 neither states nor implies a clear-statement rule. And "courts have no power to substitute their own notions" in place of the text of the Compact. *Texas* v. *New Mexico*, 462 U.S. 554, 568 (1983) (quotation marks omitted). Additionally, imposing a clear-statement rule would run afoul of another Compact provision, Article 9, which provides: "The provisions of this compact shall be liberally construed to give effect to the purposes thereof." Finally, the Special Master's interpretation of Article 3 appears to be based on a special solicitude for states' rights, which is – at most – appropriate when states contract with private parties; it is not, however, appropriate when states contract with coequal sovereigns.

Third, the Special Master sought to narrow the Commission's sanctions power by comparing the Southeast Compact's language with that of other compacts. He noted that other compacts use the words "fines" or "sum," and that those words authorize the relevant compact commission to impose monetary sanctions. The Special Master contended that the express reference to monetary sanctions in other compacts means that the absence of such a reference in the Southeast Compact indicates that such sanctions were excluded. Preliminary Report 22.

The general presumption, that such differences, when found within a single federal statute, are significant, does not apply here. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Congress authorized independent regional negotiation of low-level radioactive waste compacts. And, each compact was negotiated independently. There is no evidence in this record that any compact negotiators were informed about either the negotiation or text of the other compacts. There is simply no basis for any interpretation

of the language of the Southeast Compact by comparing it to the text of other regional Compacts.[7]

In any event, the comparison of the regional Compacts' sanctions language yields conflicting results. For example, the Southeast Compact and the Northeast Compact are the only compacts that generally authorize "sanctions." Northeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 227, Art. IV(I)(14), 99 Stat. 1909, 1915 (1986). The Rocky Mountain Compact does not authorize sanctions generally; it allows only exclusion. Rocky Mountain Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 226, Art. VIII(e), 99 Stat. 1902, 1909 (1986). Under the Special Master's reasoning, the absence of the term "sanctions" in the Rocky Mountain Compact and its inclusion in the others would mean that the Rocky Mountain Compact generally forbids sanctions. And, the Southeast Compact and Northeast Compact's broader provision – their general authorization of sanctions – should mean that these compacts authorize sanctions *beyond* exclusion. But, the Special Master ignored those comparisons. In sum, this interpretation by comparing sanctions clauses is an arbitrary methodology that should not be used, particularly when it does violence to the plain language of the Compact.

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[7] In *Texas* v. *New Mexico*, 462 U.S. at 565, this Court cited the text of contemporaneously negotiated compacts to support its reading. But, here, the undisputed record shows that the party States were not aware of the language of other interstate low-level radioactive waste compacts when they negotiated the Southeast Compact. *See* Setser Dep. Tr. at 14-15 (App. 498) (Testimony by Mr. Setser, the 30(b)(6) deponent for the Commission and one of the initial drafters of the Compact).

Fourth and finally, the Special Master expressed concern that Plaintiffs' interpretation would allow the Commission to issue sanctions without limitation. Preliminary Report 18. But, general laws authorizing remedies and penalties routinely do so without express limits on the amount or types of relief. See, *e.g.*, 42 U.S.C. § 1983; *id.* § 2000e-5(g)(1). Courts regularly interpret such laws, limiting damages to compensatory damages or reasonable punitive damages, and allowing some injunctions and not others. We are aware of no authority that the absence of an express limit on damages or penalties renders simple monetary fines wholly unavailable. In fact, the Special Master cited the Northeast Compact as an example of a Compact that provides for damages, see Preliminary Report 22, even though it lacks any express limit on damages. Northeast Compact, § 227, Art. IV(I)(14), 99 Stat. at 1915.

The Compact should be read to authorize the sanctions that the Commission voted to impose.

B. North Carolina Cannot Escape Sanctions For Its Conduct As A Compact Member By Withdrawing From The Compact.

The Special Master's conclusion that North Carolina may evade sanctions by withdrawing on the eve of its sanctions hearing is mistaken and contrary to both the Compact's text and the Commission's determination, which is entitled to deference. See *supra* at 18; *infra* at 28-30.

As noted, Article 7(F), the Compact's sanction provision, specifies: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commis-

sion imposing the sanction." Thus, the Compact text provides a straightforward answer to the question whether withdrawal prevents the Commission from imposing sanctions. Apart from noting Plaintiffs' reliance on this provision, the Special Master did not even mention this text, let alone explain why it does not govern resolution of this question. Instead, he concluded that North Carolina may render the Compact a nullity by allowing the host State to immunize itself from any sanction simply by withdrawing.

The Special Master's Report suggested two reasons for his recommendation. First, he implied, without explicitly saying, that the Southeast Compact, unlike other Compacts, does not "authorize imposition of sanctions on States even after they have withdrawn." Preliminary Report 26. Here, he is simply wrong; Article 7(F) of the Southeast Compact does provide such an authorization.

Next, the Special Master cited other Compacts that include limits on withdrawal to indicate that the Southeast Compact does not limit withdrawal. From this he concluded that a state has unlimited discretion to withdraw to escape a sanctions ruling. Preliminary Report 26-27 (citing Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, Art. VIII(d), 99 Stat. 1880, 1891 (1986) and Midwest Interstate Low-Level Radioactive Waste Management Compact, Pub. L. 99-240, Art. VIII(e), 99 Stat. 1892, 1900 (1986)). The Special Master's premise does not support his conclusion. Plaintiffs agree that North Carolina can withdraw from the Compact. But, North Carolina's withdrawal does not relieve it of previously incurred obligations, including sanctions obligations, arising out of its status as a party for conduct that occurred while it was a party. See *NLRB* v. *Granite State Joint Bd.*,

Textile Workers Union of Am., Local 1029, 409 U.S. 213, 216 (1972) ("[T]he law which normally is reflected in our free institutions [is] the right of the individual to join or to resign from associations, as he sees fit subject of course to any financial obligations due and owing the group with which he was associated.") (quotation marks omitted).

Neither the Compact's text nor settled legal principles support the Special Master's recommendation that North Carolina is permitted to escape sanctions for its conduct as a member by withdrawing. Nor would such an outcome further the purposes of the Compact. Art. 9. If a party state can simply walk away from the consequences of misbehavior as a member there is little incentive to act for the good of the region. Instead, there is every incentive to take what the Compact offers, violate the Compact until the other members decline to tolerate it, and then abandon the shared enterprise without consequence. Any such Compact "would, indeed, have been madness" and that is reason enough not to interpret the Compact to permit this result. *United States* v. *Winstar Corp.*, 518 U.S. 839, 910 (1996) (plurality opinion).

II. NORTH CAROLINA BREACHED THE COMPACT.

A. The Commission's Determination That North Carolina Breached The Compact Is Conclusive Or, In The Alternative, Entitled To Deference.

The Compact expressly and unequivocally provides that "[t]he Commission *is the judge* of [the party States'] compliance with the conditions and requirements of this compact." Art. 7(C) (emphasis added). In January 1998, and again, in April 1999 – before

North Carolina's withdrawal – the Commission exercised this authority and determined that North Carolina breached the Compact when, after soliciting $80 million to fulfill its Compact obligations, it ceased performance and refused to fulfill its obligation as host State to develop and operate a regional waste disposal facility. See Jan. 12, 1998, Hodes letter to Corgan (Joint Supp. Fact Br. App. 55) ("It is the stated position of the Commission that this constitutes a breach of the compact law by the State of North Carolina, which is obligated to proceed with the funding and the establishment of the facility."); see also Apr. 26, 1999, Hodes letter to Hunt (App. 323). The Commission reiterated this determination after North Carolina withdrew from the Compact. Dec. 9, 1999 Sanctions Res. (App. 412) ("North Carolina failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party state to this Compact."). Under the Compact, as agreed to by North Carolina, the Commission's determination of breach is conclusive.

When faced with a dispute arising from an interstate compact, this Court looks first and foremost to the language of the compact. *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998). The express terms of the compact are determinative. *Id.* Where the compact's terms specify the extent and limits of the Court's role in adjudicating disputes arising out of the compact, those terms are controlling. *Texas*, 462 U.S. at 567-68 ("The question for decision, therefore, is what role the . . . Compact leaves to this Court.").

Here, the express terms of the Compact are clear: Congress and the party States vested the Commission with the sole power to "judge" whether a party State breached the Compact. Art. 7(C). Thus, under the Compact, any court addressing a claim that in-

volves the question whether a party State has breached the Compact should accept the Commission's judgment of breach or non-breach. Cf. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 623 (2006) ("[C]omplete deference is owed [a] determination" made by the President under a statute granting him authority to make such a determination.); *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 804 (1995) (Art. I, § 5, cl. 1 of the Constitution, which provides that "'[e]ach House *shall be the Judge* of the Elections, Returns and Qualifications of its own Members,'" gives Congress "the final say.") (emphasis added).

This concept has deep roots in the common law of contracts. See 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 31:5, at 298-99, 303-05 (4th ed. 1999) ("[T]he courts properly and steadfastly reiterate the well-established principle that it is not the function of the judiciary to change the obligations of a contract which the parties have seen fit to make. . . . Thus, when interpreting a contract, a court may not delete contractual provisions . . . even if the resulting contract would be economically more efficient or advantageous to one or both parties, or more fair or equitable than the agreement the parties were satisfied to make."). This Court should enforce the Compact's express agreement and statutory mandate that the Commission is the "judge" of breach.

In his decision, the Special Master never addressed the explicit language of Article 7(C). Instead, he erroneously implied that the question of the Commission's authority to judge breach was determined in the Preliminary Report. See Second Report 19. In fact, the Preliminary Report analyzed only Article 7(F) and the Commission's authority to sanction party States – not Article 7(C) and the Commission's

authority to determine breach, whether enforceable through sanctions or through a claim for breach of Compact in the courts. The question whether the Commission has authority to *sanction* party States is wholly independent of the question whether the Commission has the authority conclusively to determine a member's *breach*. The latter authority arises from Article 7(C) of the Compact – a part of the agreement never addressed in either the Preliminary or Second Report.

If, however, this Court concludes that a court addressing a claim of breach must engage in some review of the Commission's judgment, that review should be highly deferential. The D.C. Circuit has held that the actions of an interstate compact commission, when reviewable at all, should be reviewed under the Administrative Procedure Act's ("APA's") deferential arbitrary-and-capricious standard. See *Old Town Trolley Tours of Wash., Inc.* v. *Wash. Metro. Area Transit Comm'n*, 129 F.3d 201, 204 (D.C. Cir. 1997) ("[O]ur review should not be *de novo*. That would deprive the Commission's judgment of importance and would, in effect, place the court in the position of the licensing authority."); see also *Organic Cow, LLC* v. *Ne. Dairy Compact Comm'n*, 164 F. Supp. 2d 412, 423-25 (D. Vt. 2001) (applying the arbitrary-and-capricious standard of review to the decision of an interstate compact commission), *vacated on other grounds sub nom.* 335 F.3d 66 (2d Cir. 2003). This was so, the court reasoned, not because an interstate compact commission is a federal agency subject to the APA, but because the APA's codification of the arbitrary-and-capricious standard "merely restated the present law as to the scope of judicial review." *Old Town Trolley*, 129 F.3d at 205 ("[F]ederal judicial review of agency action according to the standards

just quoted is so commonplace that . . . it would have been natural to assume that courts would treat Commission decisions in the same manner.").

In *Old Town Trolley*, the compact at issue was silent as to the arbiter of disputes, and the D.C. Circuit nonetheless applied a deferential standard of review. Here, the Compact expressly provides that the Commission "is the judge . . . of [party States'] compliance with the conditions and requirements of this compact." Art. 7(C). Accordingly, the Commission's determination, if reviewable at all, should be set aside only if arbitrary or capricious. And, far from arbitrary or capricious, the Commission's determination that North Carolina breached the Compact is, as shown *infra*, correct.

The Special Master was concerned that deference to the Commission's decision would be inconsistent with this Court's original jurisdiction. See Second Report 19-20. The opposite is true. This Court has emphasized the need to enforce compacts by their express terms. See *supra* at 26. Indeed, in *Texas*, the Court limited its deference to the compact commission because of the specific terms of the compact at issue – not because of any concern about the nature of its original jurisdiction. See 462 U.S. at 568 & n.14 (original jurisdiction did not "militate against New Mexico's theory" of deference, rather the compact expressly provided that the commission's determinations "shall *not* be conclusive in any court") (emphasis added). Here, the Compact's express terms state that the Commission "is the judge" of whether a party has complied with the terms of the Compact.

This Court routinely upholds deferential review when commanded by statute and/or contract without any negative implication for the dignity of its jurisdiction. For example, when parties to a contract

agree to submit their disputes to arbitration, judicial review of the arbitrator's award is strictly limited. See, *e.g.*, *United Steelworkers of Am.* v. *Am. Mfg. Co.*, 363 U.S. 564, 567-58 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.").

Here, the parties agreed that the Commission would be the arbiter of their differences concerning breach.[8] A reviewing court's role, therefore, is limited by statute and contract, just as in arbitration. The Commission's determination that North Carolina breached the Compact should be accepted and affirmed by this Court.

B. North Carolina Breached The Compact By Failing To Take "Appropriate Steps" To Fulfill Its Obligations As Host State.

As host State, North Carolina was required to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the des-

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[8] The Special Master asserted that the Commission was biased against North Carolina in determining breach. *See* Second Report 19. That accusation is incorrect and without basis in the record. North Carolina assisted in creating the process for determining breach, both during the original Compact negotiations and in chairing the Committee that created the Administrative Sanctions Procedure. Undisputed Facts ¶ 63. North Carolina knew the membership of the Commission and its role as the arbiter of breach. The hearing was presided over by retired Judge VanKann. North Carolina was also given the opportunity to participate in the Commission's determination and never raised bias as an issue until long after the Commission's determination, *id.*, thus, forfeiting this claim. *See Fid. Fed. Bank, FSB* v. *Durga MA Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (party's failure to object to partiality of an arbiter with a known conflict until after the arbiter's determination waives the party's ability to challenge) (collecting cases).

ignated type [was] filed with and issued by the appropriate authority." Art. 5(C). North Carolina assumed this duty when it was designated as host State in 1986, and that duty remained in force at least until North Carolina withdrew from the Compact in July 1999.

The Special Master recognized, however, that North Carolina's "efforts to complete the licensing process essentially ceased at the end of 1997." Second Report 18. Indeed, in December 1997, North Carolina voted to shut down the waste facility project, and, by its own admission, refused to take further steps to license a facility. See North Carolina Admissions ¶ 11 (after December 1997, "the Authority *did not thereafter take additional steps* to site, characterize, and, ultimately, license a waste disposal facility.") (emphasis added); Undisputed Facts ¶ 56; see also Second Report 10 ("The parties do not dispute that North Carolina did not take additional steps to pursue a license for a waste facility [from December 1997 until it withdrew].").

That fact – that as of December 1997, North Carolina refused to pursue the license to build the regional low-level radioactive waste disposal facility – necessarily means that North Carolina breached its Compact obligation to take "appropriate steps" towards licensing. As a matter of law, North Carolina's failure to do so constituted non-performance of its express duty under Article 5(C). See *Franconia Assocs.* v. *United States*, 536 U.S. 129, 142-43 (2002) ("Failure by the promisor to perform at the time indicated for performance in the contract establishes an immediate breach."); see also *Restatement (Second) of Contracts* § 235(2) (1981) ("When performance of a duty under a contract is due *any non-performance* is a breach.") (emphasis added); 23 Williston & Lord,

supra, § 63:1, at 436 ("[W]hen performance is due, anything short of full performance is a breach.").[9] The Commission, therefore, is entitled to a judgment of breach.

The Special Master declined to adopt this straightforward interpretation of North Carolina's obligation to take "appropriate steps." Instead, he found the term ambiguous and, by examining the parties' course of performance, ultimately concluded appropriate steps included doing nothing towards licensing a facility. The Special Master's analysis is wrong for several reasons, as set forth below. Indeed, it is hard to imagine how a party who ceases performance altogether could be taking "appropriate steps" towards fulfilling its obligations as the host State.

First, in the context in which it was used, the term "appropriate steps" is not ambiguous. It means proceeding through the steps required to license a waste disposal facility. The meaning of this Compact provision is informed by the Atomic Energy Act of 1954, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985, and fully set out in the United States Nuclear Regulatory Commission ("NRC") regulations. See 10 C.F.R. pt. 61.[10] The laws

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[9] Federal common-law contract principles govern the interpretation and enforcement of interstate compacts. *E.g.*, *Kansas* v. *Colorado*, 533 U.S. 1, 10-14 (2001) (relying on common-law contract rules); *Beebe* v. *Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1288-90 (D.C. Cir. 1997) (interstate compact is federal law and its interpretation and application are governed by federal common law).

[10] Under the Act, compacting states must site and license facilities as set out in the NRC regulations for licensing the disposal of radioactive waste. *See* 42 U.S.C. § 2021d(b)(3); *id.* § 2021(d)(2); *see also* Art. 6(A)(2). The NRC regulations detail the steps necessary to license and construct a low-level radioac-

and regulations lay out appropriate steps towards licensure of a low-level radioactive waste facility.

"[W]hen parties contract with reference to an industry whose terms are defined by an active supervising agency . . . , it is to be assumed in the absence of evidence to the contrary, that they have that terminology in mind." *Commercial Ins. Co. of Newark, N.J.* v. *Gonzalez*, 512 F.2d 1307, 1310 (1st Cir. 1975); see also *Superior Bus. Assistance Corp.* v. *United States*, 461 F.2d 1036, 1039 (10th Cir. 1972) (same) (citing *Keck* v. *United States*, 172 U.S. 434 (1899)). And, in fact, the record demonstrates that North Carolina understood "appropriate steps" to mean exactly what NRC regulations require. Immediately following its designation as the next host State, North Carolina identified the steps it would take, including: (1) selection of a proposed site from which data would be collected and analyzed to determine if the site characteristics met the requirements of the regulations; (2) acquisition of land; (3) selection of an operator; (4) performance of any technical improvements to the site required by the regulator; (5) obtaining licenses for the facility and achieving standards for the operation of the facility as required by the regulator; (6) operation of the facility; (7) decommissioning of the site; and (8) perpetual care of the site. See Subcommittee Report on the Roles of the State and Private Sector in a Low-Level Radioactive Waste Disposal Facility (App. 516-18); see also North Carolina Licensing Work Plan, May 31, 1996 (App. 229-33) ("The objective of the Plan is to guide activities necessary to . . . make a . . . licensing decision.").

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tive waste facility. *See* 10 C.F.R. § 61.10; *id.* §§ 61.11-.16. These regulations give specific content to the phrase "appropriate steps."

However, in December 1997, North Carolina sent the Commission a letter notifying it of the State's intention to "commence the orderly shutdown of the project." Dec. 19, 1997 Corgan letter to Hodes (App. 319). As noted, it is undisputed that over the next 19 months, while still a member of the Compact and the designated host State, North Carolina failed to take *any* steps, let alone "appropriate steps," towards obtaining or issuing a license to operate a low-level radioactive waste disposal facility. See *supra* at 31. It simply repudiated the Compact and did so while insisting that it was the other party States who were in the wrong by not providing North Carolina with more money.

The Special Master noted that North Carolina engaged in certain minimal activities from December 1997 to July 1999, and appears to have considered these to be "appropriate steps." For example, the Special Master stated that North Carolina "continue[d] to fund the Authority for several years, maintain[ed] the project's records, and preserve[d] the work done to date." Second Report 18. But North Carolina funded the Authority after December 1997 only in order to oversee "the orderly shutdown of the project." Dec. 19, 1997 Corgan letter to Hodes (App. 319). These activities thus were not steps towards licensing and did not fulfill the State's obligations under Article 5(C).

The Second Report also incorrectly suggests that North Carolina somehow discharged its duty to take "appropriate steps" by seeking alternative funding after December 1997. See Second Report 28, 36. The record does not support this conclusion. There is no evidence that North Carolina made any funding proposal, no evidence that the North Carolina Authority sought any loans, no evidence of any requests for

appropriations from North Carolina's General Assembly, and no evidence that North Carolina sought federal funds. To the contrary, the record reveals only that North Carolina *rejected* a funding proposal made by the Commission. In light of this, the Second Report was more accurate when it stated, in another context, that after December 1997, all that North Carolina did was "*hope* that alternative funding could be secured." *Id.* at 27 (emphasis added). Hoping is not an appropriate step.

Finally, the Special Master asserted that the parties' course of performance should be used in interpreting the term "appropriate steps." *Id.* at 23-28. He noted that North Carolina had received funding to assist its licensing of a facility; from this, he divined that North Carolina was required to take steps towards licensing a facility only so long as the funding continued – *i.e.*, that it was appropriate for North Carolina to cease concrete steps towards licensing once the party States no longer provided a source of funding. He stated that "the obligation [to take 'appropriate steps' to secure a license] is properly construed to be more akin to a promise to use reasonable efforts than a promise to build a facility no matter what the cost." *Id.* at 21. And, he found that, in light of the cessation of funding, it was appropriate for North Carolina simply "to fund the Authority and preserve the project until it withdrew." *Id.* at 28. This view suffers from numerous flaws and would deprive the "appropriate steps" requirement of all meaning.

First, although the parties' course of performance can assist in interpreting an ambiguous contract, it cannot be used to contradict the unambiguous terms of the agreement. 11 Williston & Lord, *supra*, § 31:4, at 274-78 ("While the court may also look to course of

performance . . . primary importance should be placed upon the words of the contract. . . . If the language used by the parties is plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and *from that language alone* . . . .") (emphasis added; footnotes omitted); see also *Cooper Distrib. Co.* v. *Amana Refrigeration, Inc.*, 63 F.3d 262, 279 (3rd Cir. 1995) (Alito, J.) ("While extrinsic evidence, such as the course of performance evidence . . . may be admissible to supplement or explain the terms of the agreement, it cannot be used to contradict unambiguous terms.") (alterations and quotation marks omitted).

The Compact is not ambiguous with respect to who bears the responsibility for funding a low-level radioactive waste facility. Significantly, it expressly states that the Commission is not "responsible for any costs associated with . . . the creation of any facility." Art. 4(K); see Preliminary Report 20 (citing Art. 4(K)) ("[T]he Compact was drafted on the apparent assumption that a State (such as North Carolina) designated as a host State would bear the costs of building its own disposal facility and would not receive funding from the Commission."); cf. N.C. Gen. Stat. § 104G-4 (repealed 2000) (App. 34) (the Authority is responsible to "site, finance, [and] build" a facility to receive the region's low-level radioactive waste for disposal.). In light of the Compact's clear allocation of funding responsibility, it was error for the Special Master to find that North Carolina's obligation to take appropriate steps towards licensing was conditioned upon the continued provision of funding.

Second, the Special Master concluded that North Carolina's sovereign status supported his view that the term "appropriate steps" should be interpreted by the parties' course of performance. Second Report 23

(citing Art. 3). He cited no authority in support of this proposition. Regardless of any sovereign status, however, course of performance is not applicable to unambiguous contract terms. Just as when the federal government waives its immunity and enters a contract, North Carolina is subject to the ordinary principles of contract law and interpretation; these rules do not change because a State is a contracting party. Cf. *Franconia Assocs.*, 536 U.S. at 141 ("Once the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity."). This is particularly true where, as here, *both* contracting parties are sovereigns and the contract at issue is a Compact. All party States made the same promise to each other – to fund the licensing of a low-level radioactive waste facility when it came their turn to be the host State. Finally, as explained *supra* at 35-36, even if resort to the parties' course of performance is permissible, it cannot be used to contradict the Compact's explicit provisions making clear that funding is exclusively the responsibility of the host State.

Third, the Special Master used the parties' course of performance to give the term "appropriate steps" a meaning that makes no sense in context. See *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006) ("[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"). The Compact's essential purpose is to provide for the cooperative establishment of low-level radioactive waste disposal facilities. To accomplish this, each host State was responsible for funding the licensure of a facility. The "appropriate steps" necessary to achieve this purpose are evident, and North Carolina cannot reasonably be said to have fulfilled its obligation to

take such steps merely by "preserv[ing] the project until it withdrew." Second Report 28. North Carolina had a duty to continue to fund the licensing process and take steps, *i.e.*, move forward towards licensing.

Ultimately, however, the parties' course of performance does not support the Special Master's decision that North Carolina took appropriate steps under the Compact. It was North Carolina – not the Commission – who bore the responsibility of funding the siting and licensing of the facility. It is undisputed that shortly after entering the Compact and becoming the host State, North Carolina enacted into law its clear understanding that it would fund the facility. N.C. Gen Stat. § 104G-4 (repealed 2000) (App. 34) (The Authority is "to site, *finance*, build, lease or operate, oversee, monitor and close [the regional] facility.") (emphasis added). To that end, the North Carolina Authority's Legal and Finance Committees immediately identified funding mechanisms, including state appropriations, revenue bonds, private loans, and federal public assistance bonds. See Dec. 7, 1987 and Jan. 11, 1988 Minutes of North Carolina Authority's Legal and Finance Committee Meeting (App. 519-20 & 523-24). And, North Carolina began appropriating funds.[11] See 1987 N.C.

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[11] The Compact parties' understanding was that each host State, in turn, would fund the siting, licensing, and construction of a facility upfront and later use the fees and surcharges levied on users of the completed facility to repay the state for those expenditures, and then fund other state initiatives. *See* Nov. 17, 1988 Report to the Joint Legislative Commission on Government Operations by the NC Authority (App. 528) ("It is the understanding of the [North Carolina] Authority that all money expended for the planning, developing, licensing, regulating, constructing, operating and closing this disposal facility *will be paid for by the operation of the facility and that all appropriated*

Sess. Laws ch. 1086 (appropriating funds for "Low Level Radioactive Waste Management Site Development") (App. 60).

Moreover, each time it requested funds from the Commission, North Carolina recognized that the Commission had no legal obligation to make those payments.[12] In fact, Governor Hunt told his constituents as much only six months before North Carolina stopped performing. May 19, 1997, Hunt letter to Rimmler (App. 275) ("The Compact law . . . does not provide a funding mechanism for the host state. Indeed, that law requires the state which is currently developing a site for use by the Compact members to bear the full burden of the cost."). On these undisputed facts, the parties' course of performance does not support the conclusion that the Commission was responsible for funding the facility or that North Carolina's obligation to take appropriate steps to provide a facility were conditioned on Commission funding. The record conclusively demonstrates just the opposite – that these were North Carolina's obligations.

The Special Master placed particular reliance on the February 1988 Commission resolution establishing the Host State Assistance Fund as a significant indication that costs were relevant in determining whether North Carolina took "appropriate steps."

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money from the General Assembly will be repaid from this revenue.") (emphasis added).

[12] *See* MacMillan, Executive Director of North Carolina Low-level Radioactive Waste Management Authority, Dep. Tr. at 40:13-:17 (App. 470) (Question (by Ms. Kochler): "Was it your understanding that [the Commission] w[as] obligated to make [funds requested by the Authority] available . . . ?" Answer (by Mr. MacMillan): "Well, I knew that at any time they could say no.").

Second Report 25. Passed two years after contract formation and stating that the fund is "necessary and appropriate" for the construction of the facility, the resolution cannot bear this weight. In fact, the resolution clearly states that the Commission is not obligated to provide financial assistance. Resolution, Feb. 9, 1988 ("[T]he Commission, although not obligated to do so under the Compact," provides this funding.) (App. 63). Furthermore, North Carolina specifically recognized at the time it requested this funding that the resolution's language did not alter the meaning of the Compact. See N.C. Gen Stat. § 104G-4 (repealed 2000) (App. 34).[13] Finally, over subsequent years, the Commission reiterated, and North Carolina agreed, that North Carolina – not the Commission or the party States – had a duty to fund the facility.

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[13] This resolution provided only an initial sum of $200,000 for assistance to any state designated as the next host State for planning, administrative, and other pre-operational costs, *i.e.*, a small fraction of the total cost of the facility that North Carolina voluntarily undertook to finance, license, and operate. *See* Dec. 7, 1987 Minutes of North Carolina Low-Level Radioactive Waste Management Authority's Legal and Finance Committee Meeting (App. 519) ("[T]he Southeast Compact Commission has budgeted $200,000 per year for utilization of the next host State to *partially off-set* pre-operational costs.") (emphasis added). It thus cannot be viewed as altering the parties' understanding of North Carolina's fundamental obligation to finance the project under the Compact. *See* Resolution, Feb. 9, 1988 (App. 63). To be sure, the 1998 resolution stated that certain funding was both "appropriate" and "necessary." However, this language applied to the small amount of "seed" money provided for by the actual resolution. None of the parties ever understood that this was a statement applying to all funding by the Commission over the entire eleven-year period. In fact, North Carolina continued to reiterate, long after this resolution, that it – and not the Commission – had the responsibility to fund the facility.

The Special Master read North Carolina's obligations out of the Compact, viewing the Compact as aspirational, rather than treating it as a federal statute and contract. He opined that "each of the participating States hoped to receive the benefit of being able to dispose of waste at a facility outside its borders, while avoiding the burdens of being the State selected to host the waste disposal facility." Second Report 13. He claimed, further, that the Compact was "designed to maximize the participating States' ability to extricate themselves from the arrangement if they had the misfortune of being chosen as the host State" and that "[u]nder such a regime, it would be surprising indeed if a facility were actually constructed without significant assistance from the States not selected as hosts or from the Commission, drawing on other sources of revenue." *Id.* at 14. This ineffectual reading of the Compact and the commitments it involved cannot be reconciled with the facts: The Compact is a federal statute, and Congress intended to address – not avoid – the problem of low-level radioactive waste disposal when it authorized and then enacted into law these regional waste disposal compacts. Once chosen as a host State, North Carolina was obligated by the Compact, at a minimum, to take "appropriate steps to ensure that [a] license to construct and operate a facility . . . [wa]s filed with and issued by the appropriate authority." Art. 5(C). This it did not do.

C. North Carolina Breached Its Implied Covenant Of Good Faith And Fair Dealing.

Independently, North Carolina breached the Compact when, after inducing the other party States to invest more than eleven years and almost $80 million in the development of a regional waste disposal facil-

ity, it ceased performing based on the Commission's denial of funding and then withdrew from the Compact on the eve of the sanctions hearing. In these circumstances, North Carolina's withdrawal breached its implied covenant of good faith and fair dealing.

"*Every contract* imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Restatement (Second) of Contracts* § 205 (emphasis added). The duty of good faith and fair dealing "is based on fundamental notions of fairness." 2 E. Allan Farnsworth, *Farnsworth on Contracts*, § 7.17, at 355-56 (3d ed. 2004) (citing U.C.C. § 1-304). It requires of each party "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Restatement (Second) of Contracts* § 205, cmt. *a*. While "[a] complete catalogue of types of bad faith is impossible," commonly recognized examples include "evasion of the spirit of the bargain," "lack of diligence," and "willful rendering of imperfect performance." *Id.* § 205, cmt. *d*. Failure to perform in good faith is a breach. 23 Williston & Lord, *supra*, § 63:21, at 497-98 ("the failure to perform a duty when performance is due is a breach, . . . as, for example, is the case where there is a breach of the duties of good faith and fair dealing").

To be sure, North Carolina could withdraw from the Compact; it simply could not do so in bad faith. North Carolina's withdrawal from the Compact, in this instance, was the epitome of bad faith and unfair dealing. As noted above, North Carolina sought and obtained almost $80 million to assist it in fulfilling its Compact obligations and, ultimately, to produce a waste disposal facility. While doing so, North Carolina repeatedly reaffirmed its commitment to complete a facility. See, *e.g.*, N.C. Governor's Press Re-

lease (Nov. 8, 1989) (App. 75), ("The task of siting and operating a low-level radioactive waste disposal facility is a commitment the State of North Carolina has made and one which I am personally committed to keeping."); Oct. 25, 1990, Gov. Martin letter to Campbell (App. 92), ("North Carolina remains *committed to fulfilling its obligations* to the Compact to serve as the next host state."); Apr. 4, 1991, Gov. Martin letter to Hodes (App. 102), ("North Carolina expresses its continued highest level of *commitment to the timely establishment of the . . . facility*") (emphases added).

But, when the party States ceased providing funding, North Carolina refused to perform, claiming that this cessation eliminated its duty to do so. North Carolina made this claim in the face of unambiguous Compact language stating that the Commission is not responsible for funding the host State's facility. Finally, with a sanctions complaint pending against it, North Carolina withdrew from the Compact seeking to escape accountability. This opportunistic conduct is inconsistent with the Compact and with the State's duty of good faith and fair dealing; it also undermines the stability of Compacts and the predictability of contractual relations. See, *e.g.*, *Mkt. Street Assocs. Ltd. P'ship* v. *Frey*, 941 F.2d 588, 595 (7th Cir. 1991 ("The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of a rule.").

The Special Master determined that the duty of good faith and fair dealing does not apply here. First, he cited considerations of federalism, stating that "judicial imposition of compact terms beyond those for which the States have expressly bargained poses risks similar to those inherent in interpreting am-

biguous federal statutes to impose obligations on States in areas . . . in which the States have exercised 'traditional and primary power.'" Second Report 30 (quoting *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001)).

But, this solicitude for North Carolina ignores that its contractual partners are also sovereigns. When States contract with fellow States, federal common-law contract principles apply. *Oklahoma* v. *New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part) (an interstate compact "remains a contract which is subject to normal rules of enforcement and construction"); see also *Beebe* v. *Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1288-90 (D.C. Cir. 1997) (interstate compact is federal law whose interpretation is governed by federal common law). The implied duty of good faith is such a principle. In *Tymshare, Inc.* v. *Covell* 727 F.2d 1145, 1153 (D.C. Cir. 1984), then-Judge Scalia explained that the modern expression of "good faith" is a surrogate for the long-standing common-law principle that there are "implied obligation[s] or limitation[s]" in a contract. See *id.* at 1152 (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)). When sovereigns contract, each is entitled to the benefit of normal contract-law principles.

The Special Master also wrongly believed that if he were to read a duty of good faith into the Compact, that would limit North Carolina's express right to withdraw. Second Report 31. While the Compact states that "any party state may withdraw from this compact," Art. 7(G), it does not authorize a State to withdraw in bad faith or for any reason whatsoever, no matter how arbitrary or unreasonable and no matter whether the State's withdrawal would defeat substantial and justified reliance interests of the

other party States.[14] The Compact cannot reasonably be read to authorize this type of bad faith withdrawal.[15]

The structure of the Compact and the statements of the contracting parties provide the best evidence of the parties' understanding of their mutual commitments. Both confirm that the parties understood and intended each party State to undertake its respective responsibilities under the Compact in good faith. The *Tymshare* court concluded that the appropriate question is "whether it was reasonably understood by the

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[14] Many courts have recognized that an express right to terminate a contract must be exercised consistently with the duty of good faith and fair dealing, particularly where, as here, the contractual relations among the parties "involve a special element of reliance." *See, e.g.*, *Bohne* v. *Computer Assocs. Int'l, Inc.*, 445 F. Supp. 2d 177, 181 (D. Mass. 2006) (quotation marks omitted) (collecting cases), *rev'd on other grounds*, 541 F.3d 141 (1st Cir. 2008); *United Roasters, Inc.* v. *Colgate Palmolive Co.*, 649 F.2d 985, 989 (4th Cir. 1981) ("[w]hen termination is oppressive, when it would frustrate expectations reasonably held, though unsecured by express contractual agreements and when it will impose substantial losses upon the other party, application of the [good-faith] principle may well be called for"); *Randolph* v. *New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1386 (6th Cir. 1975) (duty of good faith applies to "the exercise of a facially unrestricted termination clause").

[15] The Special Master attempted to distinguish *Entergy Arkansas, Inc.* v. *Nebraska*, 358 F.3d 528, 547-48 (8th Cir. 2004), where the Eighth Circuit held that the duty of good faith applied to an interstate compact, by noting that there was an express provision in the Compact obligating the States to act in good faith. Second Report 31, n.3. However, in analyzing the issue, the Eighth Circuit looked to the *Restatement (Second) of Contracts* and cited this Court's reference to the *Restatement* in another interstate compact case, *Texas* v. *New Mexico*, 482 U.S. 124, 129 (1987). The *Restatement* similarly compels application of the good faith doctrine here. *See Restatement (Second) of Contracts* § 205.

parties to th[e] contract that there were at least certain purposes for which [an] expressly conferred power . . . could not be employed." 727 F.2d at 1153. North Carolina has admitted that it understood that the Compact required it to act in good faith. "The obligation conferred on North Carolina under the terms of the Compact was *to work in good faith* to construct a facility, unless and until North Carolina exercised its right to withdraw from the Compact and forgo the benefits of membership." Def. Reply to Mot. to Dismiss at 19 (emphasis added).[16] North Carolina's cessation of performance based on the Commission's refusal to provide further funds followed by withdrawal when sanctions were threatened constitutes bad faith as a matter of law.

Regardless of the Special Master's contrary view, the "duty of good faith" applies to "the exercise of a facially unrestricted termination clause," *Randolph* v. *New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1386 (6th Cir. 1975), unless the express language or the structure of the contract requires another reading. See *Tymshare*, 727 F.2d at 1154. Nothing in the

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[16] A contract *can* be written so "'as to leave decisions absolutely to the uncontrolled discretion of one of the parties.'" *Tymshare*, 727 F.2d at 1153. But "the trick is to tell *when* a contract has been so drawn – and surely the mere recitation of an express power is not always the test." *Id.* (emphasis in original). "[T]o say that every *expressly conferred contractual power* is of this nature is virtually to read the doctrine of good faith . . . out of existence." *Id.* at 1153-54 (emphasis added). If the express terms of the Compact were enough to allow the states unlimited discretion to withdraw, there would be no implied duty of good faith. *Id.* at 1153 ("[W]e must reject at the outset the proposition . . . that as to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct.") (internal quotation marks and alteration omitted).

text or structure of the Compact suggests that the party States have been relieved of their obligation to act in good faith.

Indeed, reading the Compact to allow bad faith withdrawals would render the contract illusory. On this reading, party States can reap the benefits of Compact membership and yet withdraw at any time after being designated the host State and do so in bad faith. This Court should not read the Compact cynically as the Special Master did – to render it self-defeating. *E.g.*, *Restatement (Second) of Contracts* § 76, cmt. *d* ("Words of promise do not constitute a promise if they make performance entirely optional with the purported promisor. Such words, often referred to as forming an illusory promise, do not constitute consideration for a return promise.") (citation omitted). Instead, the Court should enforce the contracting parties' duty of good faith and fair dealing and find that bad faith withdrawals constitute a Compact breach. See, *e.g.*, 1 Farnsworth, *supra*, § 2.13, at 137 (courts "salvage[ ] [an otherwise illusory contract] by requiring that one of the parties perform in good faith").[17]

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[17] Even if the Compact were illusory, the Plaintiff States would be entitled to restitution of the benefit they conferred on North Carolina in the mistaken belief that the parties had entered into a legally binding contract. *See Restatement (Third) of Restitution & Unjust Enrichment* § 5(2) (T.D. No. 1, 2001) ("[t]he mistake that will serve as the basis for rescission and restitution . . . is a misapprehension of fact or law on the part of the transferor, where (a) but for the mistake the transfer would not have taken place; and (b) the transferor does not bear the risk of the mistake"); *id.* § 31, cmt. *a* (T.D. No. 3, 2004) ("[I]f a purported agreement proves after performance to be unenforceable because of a defect in contract formation – with the result that the claimant has performed in the mistaken belief that a contract exists when in fact it does not – the resulting restitu-

D. North Carolina Repudiated The Contract.

North Carolina also repudiated the contract. A repudiation is "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." *Restatement (Second) of Contracts* § 250(a), see also *Mobil Oil Exploration & Producing Se., Inc.* v. *United States*, 530 U.S. 604, 608 (2000) (same); 9 Arthur Linton Corbin, *Corbin on Contracts*, § 959, at 759 (Interim ed. 2002) (repudiation occurs when "the promisor makes a definite statement to the promisee that he either will not or can not perform his contract"); see also *id.*, § 972, at 798.

North Carolina repudiated the Compact when it flatly informed the Commission and the member States that it would "commence the orderly shutdown of the project" and thereafter ceased performing. Dec. 19, 1997, Corgan letter to Hodes (App. 319). The Special Master failed to mention or analyze North Carolina's repudiating statements.[18]

By its terms, the Compact requires North Carolina to "take appropriate steps to ensure that an applica-

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tion claim is generally regarded as one for benefits conferred by mistake.").

[18] The Special Master appeared to misunderstand Plaintiffs' repudiation argument, describing it as follows: because "North Carolina took the position that it could not complete the licensing process on its own and decreased its expenditures from approximately $2 million a year to approximately $440,000 a year . . . North Carolina repudiated its obligations under the Compact." Second Report 27. That is not Plaintiffs' argument. Instead, Plaintiffs argue that North Carolina repudiated the contract on December 19, 1997, when it informed Plaintiffs that it would commence the orderly shutdown of the project and take no steps to license a facility as required by the Compact.

tion for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Art. 5(C). However, in a letter dated December 19, 1997, addressed to Chairman Hodes of the Commission and copied to the "Southeast Compact Member State Governors," Chairman Corgan of the North Carolina Authority stated that the cessation of funding from the Commission had "made further performance by the Authority impossible" and left the Authority with "no alternative but to commence the orderly shutdown of the project." Dec. 19, 1997 Letter (App. 317, 319). On the same day, the Authority passed resolutions directing the Authority's contractors and staff "to begin an orderly cessation of facility development activities." Dec. 19, 1997 Minutes of North Carolina Authority Meeting (App. 322).

These statements constitute "a refusal to render any further performance whatever under the contract," 9 Corbin *supra*, § 972, at 798, and, therefore, constitute a classic repudiation. The repudiation is underlined by North Carolina's *admission* that it took no steps to license or site a facility after December 19, 1997. See Second Report 10; see also Undisputed Facts ¶ 55; Def. Statement of Material Facts Not in Dispute ¶¶ 67-70.[19]

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[19] The Special Master also believed that North Carolina did not repudiate the contract because it did not "act in a way that rendered it unable to perform under the Compact." Second Report 27. North Carolina's *ability* to perform does not preclude a finding of repudiation. Repudiation occurs one of two ways: when a party "cannot" perform or "will not" perform "at least some of its obligations under the contract." 2 Farnsworth, *supra* § 8.21, at 558. North Carolina, while able to perform, refused to do so. That is a repudiation.

The Special Master seemed to believe that North Carolina did not repudiate its obligations because it stated it was willing to perform if the Commission provided further funding. Second Report 27 ("North Carolina did not state that it intended to breach the Compact. To the contrary, North Carolina took the position that it was not obligated under the Compact to bear all of the costs associated with licensing a facility."); see also Def. North Carolina's Opp'n to Pls.' Mot. for Summ. J. at 15 ("Had the Commission provided further funding to North Carolina, the Authority would have resumed the licensing process.").

This conditional willingness to perform only if other parties to the Compact forgo their rights under the agreement does not alter North Carolina's repudiation. "[L]anguage that under a fair reading 'amounts to a statement of intention not to perform except on conditions which go beyond the contract' constitutes a repudiation." *Restatement (Second) of Contracts* § 250, cmt. *b* (quoting U.C.C. § 2-610, off. cmt. 2); *accord* 2 Farnsworth, *supra*, § 8.21, at 562.

Under the express terms of the Compact, the Commission "is not responsible for any costs associated with . . . the creation of any facility." Art. 4(K). The obligation to fund the facility was North Carolina's, which it recognized. N.C. Gen. Stat. § 104G-4 (repealed 2000) (App. 34) (the Authority is responsible to "site, finance, [and] build" a facility to receive the region's low-level radioactive waste for disposal.). North Carolina's refusal to fulfill its obligations as host State absent funding clearly "amount[ed] to a statement of intention not to perform except on conditions which go beyond the contract" and therefore "constitut[ed] a repudiation." *Restatement (Second) of Contracts* § 250 cmt. *b* (internal quotation omitted).

Finally, North Carolina cannot avoid repudiation by pointing to its efforts to "fund the authority for several years, maintain the project's records, and preserve the work done to date," Second Report 18, in the "hope" that alternative funding could be secured. This conduct is simply another aspect of North Carolina's conditional refusal to perform, seeking to extract from its contract partners funds that they were not contractually required to provide.

North Carolina repudiated its Compact obligations when it made a definite statement that it would not take steps to site and license a facility, and made good that threat.

III. THE PLAINTIFFS ARE ENTITLED TO RESTITUTION.

North Carolina's breach of the Compact entitles the party States to standard contractual remedies, including restitution. 9 Corbin, *supra*, § 946, at 717 ("For every breach of contract, irrespective of its size or kind, the law will give an immediate remedy.").[20] When a breach of contract occurs, the non-breaching party is entitled to restitution of any benefit he conferred on the breaching party, and that is the relief Plaintiffs seek. *E.g.*, *Restatement (Second) of Contracts* § 344, cmt. *d* (Restitution is the appropriate contract remedy where, "instead of seeking to enforce an agreement, [the injured party] claims relief on the

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[20] In the alternative, the States are entitled to damages. *Restatement (Second) of Contracts* § 236, cmt. *a* ("Every breach gives rise to a claim for damages, and may give rise to other remedies."). *Id.* § 347, cmt. *a* ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.").

ground that the other party has been unjustly enriched as a result of some benefit conferred under the agreement.").

The principles governing restitution as a remedy for breach of contract are set forth in § 373 of the *Restatement (Second) of Contracts*. See *Mobil Oil*, 530 U.S. at 608 (relying on § 373 for the "relevant principles"). Subject to an exception not applicable here, § 373 provides:

> [O]n a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

Under § 373, the party States are entitled to restitution because (1) North Carolina committed a breach by non-performance that gave rise to a claim for damages for total breach and a repudiation; (2) North Carolina received a benefit; (3) the benefit was conferred by the party States; and (4) the benefit was conferred by way of part performance "or reliance." See *supra* at II.B.

Critically, the Commission, acting on behalf of the party States, did not provide funds in *performance* of the Compact – neither the States nor the Commission had a duty under the Compact to provide North Carolina with funding. But the funds were provided in *reliance* on the Compact and on North Carolina's representations thereunder. Put another way, the Commission, on behalf of the Party States, would not have provided funds absent North Carolina's obligation and commitment to the other States to develop and operate a regional facility as required by the Compact. Plaintiffs were fully justified in that reli-

ance because North Carolina repeatedly affirmed that it would develop and operate a regional facility and otherwise fulfill its obligations under the Compact. See *supra*, at 8, 42-43. An injured party is entitled to restitution of benefits conferred in justifiable reliance on an agreement. *Restatement (Second) of Contracts* § 370, cmt. *a* (restitution is appropriate "if the party seeking restitution relies on the contract in some [way other than by performance]").

Accordingly, the Plaintiffs are entitled to restitution of $80 million, plus interest. See, *e.g.*, 12 Corbin, *supra*, § 1108, at 29 ("If the plaintiff has made money payments to the defendant and there is later a failure of consideration therefore, involving a repudiation by the defendant or any other breach going to the essence of the contract, the plaintiff can maintain an action for restitution of the money so paid to the defendant, with interest.").

CONCLUSION

For the foregoing reasons, this Court should adopt Plaintiffs' exceptions and order the enforcement of the sanctions order or, in the alternative, order North Carolina to pay full restitution.

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